can in no way conceivable under present economic conditions become instruments for oppression,—weapons with which their wielders can "bludgeon the public." As the Supreme Court has repeatedly said, however, businesses which are today purely private may tomorrow, through a now inconceivable change of conditions, enter the "public interest" class.

Inasmuch as the Supreme Court has steadily extended the scope of the phrase "business affected with the public interest" without committing itself to any definition or test it is perhaps unlikely that it will now alter this policy. Nevertheless, the test suggested by Freund and by the district court in the Indiana case seems logical, fits all applications of the power which have been sanctioned by the Supreme Court and seems both enlightening and reassuring as to the extent to which the doctrine will be carried. A. W. B.

APPEALS BY THE STATE IN CRIMINAL CASES.—Many state constitutions provide that no one shall be placed twice in jeopardy for the same offense. Hence, after an acquittal by a jury the State cannot prosecute an appeal for the purpose of securing a reversal. But an appeal ordinarily serves two very distinct purposes. It not only questions the correctness of the judgment below as a basis for affirming or reversing it, but it operates as a means for enabling the higher court to lay down rules of decision to be followed in subsequent cases. This is the characteristic common law method for the development of the law, and unless cases can be appealed the law can never be authoritatively expounded. To secure this exceedingly important result in criminal cases many States have by statute provided for appeals by the State for the sole purpose of determining questions of law.

It is quite obvious that when such an appeal is taken on a question of law after a verdict of not guilty, the decision of the appellate court can have no direct effect in that case. The double function normally performed by an appeal changes to the single function of declaring the law without affecting the question of present liability.

Now this opens an excellent opportunity for a technical attack on the validity of the whole proceeding. Every new step in legal administration has to run the gauntlet of that considerable number of judges who are instinctively inclined to consider novelty and unconstitutionality as synonymous terms. The statute under discussion calls for a decision in a case no longer pending in the full and ordinary sense. The controversy between the parties, so far as it is to be determined and fixed by the judgment, is entirely over. The presence or absence of error is an academic question in that particular case. Why, then, should a court bother itself further? Why not stop the whole proceeding and refuse to take any chance of committing the judicial impropriety of passing on a "moot" case?

In *State* v. *Allen* (Kan., 1920) 191 Pac. 476, this question is quite vigorously argued on both sides. But the reactionary element was in the minority, and the State of Kansas has placed itself in the list of States which recognize that courts can serve the people in new ways and still survive. The minority opinion is an excellent example of that extreme judicial conservatism so familiar to the student of legal history, though curiously enough it

fails to cite the one conspicuous authority which squarely supports its conclusion. That authority is *United States* v. *Evans* (1907) 30 App. D. C. 58, affirmed on certiorari in 213 U. S. 297 (1909). In that case the United States Supreme Court held that deciding an appeal for the purpose of establishing a rule of law to be observed in subsequent cases was not an exercise of judicial power. The decision is illustrative of the curious tendency of the United States Supreme Court to be very conservative and technical in regard to formal and procedural matters while showing the most enlightened liberality in determining many questions involving substantial rights. It is in line with the astonishing decision in *Slocum* v. *New York Life Ins. Co.* (1913) 228 U. S. 364, which held invalid a statute providing for the entry of a judgment notwithstanding a verdict where the court erroneously failed to direct a contrary verdict on motion made at the trial, and with such cases as *Insurance Co.* v. *Hallock* (1869) 6 Wall. 556, holding a writ without a seal absolutely void on collateral attack.

Doubtless judicial power was not exercised in exactly this way at the common law. But it is clear that one of the important duties of appellate courts has always been the exposition of the law through decisions upon points arising in the course of litigated controversies, and if the State is so desirous of securing the exercise of this function that it is willing to enjoy it even though it has to dispense with the normally concurrent function of affirming or reversing the judgment, why should the courts refuse to do that much merely because they find themselves unable to do more? These statutes authorizing the determination of points of law are rather common and have been accepted practically without question for many years by a substantial number of our state courts. In Ohio such an act has been in force since 1869 (L. 1869, p. 310); in Indiana since 1852 (R. S. 1852, 381); in Iowa at least since 1860 (R. S. 1860, Sec. 4926). In these States and in many others the practice is well settled and commonly used. See *State* v. *Laughlin* (1908) 171 Ind. 66; *State* v. *Arnold* (1895) 144 Ind. 651; *State* v. *Willingham* (1905) 86 Miss. 203; *State* v. *Gilbert* (1908) 138 Iowa 335; *State* v. *Ward* (1888) 75 Iowa 637; *State* v. *Frisbee* (1912) 8 Okla. Cr. 406; *Commonwealth* v. *Bruce* (1881) 79 Ky. 560; *State* v. *Du Laney* (1908) 87 Ark. 17; *State* v. *Speer* (1916) 123 Ark. 449. *State* v. *Miller* (1913) 14 Ariz. 440, seems to be the only instance of a State court refusing to sustain the validity of such a statute, due, apparently, to its being somewhat overawed by the action of the United States Supreme Court in the *Evans Case*.

The practice has obvious advantages. Vital questions of law may otherwise be wrongly decided with no adequate means for setting them right. As the majority in *State* v. *Allen (supra)* observe, the practice authorized by the statute was criticised "not on account of any practical evil consequences which might be apprehended, but by reason of a somewhat extreme application of an abstract theory." That criticism of this technical kind did not appeal to the court is an encouraging indication that, in spite of occasional relapses, American appellate courts are generally alive to their duties and responsibilities in making the judicial department of the government responsive to the demands of a developing social order. E. R. S.